SUPREME COURT, U. S.

DEC 2 1

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-690

ANONYMOUS,

Petitioner,

v.

HENRY A. KISSINGER, Secretary,
United States Department of State, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Anonymous prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 5, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 499 F.2d 1097 (D.C. Cir. 1974). The opinion of the U.S. District Court for the District of Columbia is unreported. Both opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered on July 5, 1974. On September 23, 1974, Mr. Justice Brennan issued an order extending the time for filing this petition until December 2, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the Government discharges an employee for refusing (1) to allow access to confidential medical records of his consultations with psychiatrists and (2) to submit to an interview with a Government psychiatrist, may the Government's action constitutionally be upheld in the face of a showing that it had a less intrusive means of furthering its interests?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit which essentially affirmed the decision of the District Court granting summary judgment to respondents and thereby upheld petitioner's dismissal from his Government job.

Petitioner was a temporary employee in the Peace Corps, an agency in the Department of State. His job performance since he began work on November 14, 1968, had

been entirely satisfactory, his loyalty was not questioned, and his behavior had been exemplary.

On Feburary 5, 1969, in the course of a security investigation to clear him for a "non-critical, sensitive" position,[1] Government investigators subjected petitioner to what the Court of Appeals called a "humiliating and degrading interrogation dealing principally with his sex life."[2] 499 F.2d at 1098. (App. 3a). This interrogation revealed that on two occasions while under stress petitioner had briefly consulted psychiatrists. At the insistence of the investigators, petitioner executed a release giving them access to the records on him in the possession of the two psychiatrists.

A month later, without having contacted either of the two psychiatrists and on the basis of no other information, the agency directed petitioner to report to a Government psychiatrist for an "interview." On advice of counsel, petitioner rescinded the releases and did not submit to the interview. Under threat of dismissal, he offered through counsel to have the two psychiatrists write reports on him for the Government psychiatrist to review to determine if there remained any question of petitioner's emotional stability. The Government psychiatrist later agreed that this method was satisfactory and that the compelled interview

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[1] All positions in the Peace Corps, including administrative positions like petitioner's, were designated as "sensitive."

[2] Because of the highly private information revealed during these interviews, petitioner received permission to proceed anonymously. Some of the questions posed to petitioner, for instance, involved his relationship with his wife before their marriage. The record remains under seal.

was not.[2a] The Government stood firm, however, and dismissed petitioner for "refusal to cooperate."

Petitioner filed suit, and in due course the District Court granted summary judgment to respondents. The Court of Appeals, in its opinion of July 5, 1974, *supra*, although conceding that the point was "not without difficulty," 499 F.2d at 1103 n. 15 (App. 13a), rejected petitioner's argument that the agency was constitutionally required to use the least intrusive means to satisfy whatever legitimate objectives the agency had – although the court stated that the agency "would have been well advised" to accept one of the compromises petitioner had suggested. The court affirmed the District Court on the ground that petitioner's prior "psychiatric counseling, even though limited, furnished reasonable ground" for the agency to make the demands it had made and to dismiss petitioner for refusing to accede.[3]

[2a] This fact appears in an affidavit the District Court struck from the record. The Court of Appeals did not disturb that ruling in the mistaken belief that the affidavit added nothing to the correspondence already in the record. 499 F.2d at 1101 (App. 8a).

[3] The court did, however, order the lower court to eliminate its finding that petitioner had answered falsely when he gave a negative answer to the question on the security form: "Have you ever had a nervous breakdown or have you ever had medical treatment for a mental condition?" and the court also ordered that the parties be given an opportunity to explore removal of the stigma of "refusal to cooperate" from his record. 499 F.2d at 1102, 1103 n. 15 (App. 13a, 14a).

REASONS FOR GRANTING THE WRIT

This case involves a challenge to Government action on the ground that it unnecessarily deprived petitioner of a fundamental right of privacy. The precise Government action reviewed by the courts below was the dismissal of an employee when he refused to give Government security investigators access to confidential records of his consultations with psychiatrists and to submit to an "interview" by a Government psychiatrist.[4] The cardinal error which the Court of Appeals committed in upholding the Government's action was in applying the deferential standard of judicial review – that there be a relationship between action and objective – that is suitable only in cases not raising privacy or other First Amendment issues. The opinion of the Court of Appeals made clear that the court, if it had applied the stricter constitutional standard we contend is applicable, would have reached the opposite result.

What is at stake here is the privacy of those who apply for or hold Government jobs or security clearances. This is a large number of Americans. In 1971, the Federal

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[4] The Court recently granted certiorari, 42 U.S.L.W. 3652 (1974) in *Roe v. Doe*, No. 73-1446 to decide whether the First Amendment was violated by a preliminary injunction against the distribution of a truthful, nonobscene book dealing with questions of scientific and medical importance; the injunction was based upon an alleged breach of the confidential relationship between a psychiatrist and his patient.

Government was the nation's largest employer, with 3,000,000 civilian workers (almost four percent of the national work force).[5] Not all of these employees are required to have security clearances, but a large number of persons employed in private industry are required to have such clearances because of work on Government contracts. Moreover, the problem of Government invasion of employees' privacy is by no means academic.[6]

1. There can be no doubt that the interest the Government sought to invade in this case was a constitutionally protected right of privacy. This Court most recently recognized a right to privacy in *Roe v. Wade*, 410 U.S. 113 (1973), restating there that only rights deemed "fundamental" or "implicit in the concept of ordered liberty," are included within the "guarantee of personal privacy." *Id.* at 152. Moreover, the Court stated that where certain "fundamental rights" are involved, regulation can be justified only by a "compelling state interest." *Id.* at 153. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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[5] Prepared Statement of Terence E. Carroll. Hearings before the Subcommittee on Employee Benefits of the Committee on Post Office and Civil Service, On H.R. 7199 and Related Bills, House of Representatives, 92nd Cong., 1st Sess., 1971, at p. 256.

[6] One union official estimated that his union received 1500 to 2000 complaints per year from its members concerning invasion of privacy. Statement of Carl Sadler, legislative representative of the American Federation of Government Employees (AFL-CIO). *Id.* at p. 399.

If the right to have an abortion or to use contraceptives is a protected right of privacy, it must follow that the right to have confidential communications with a psychiatrist is likewise protected. *Cf. Stanley v. Georgia,* 394 U.S. 557, 565 (1969) (Government is not permitted "the power to control men's minds" or to control "the moral content of a person's thoughts").

Justice Brandeis first described the fundamental nature of the right of privacy in these terms:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

It is precisely with Americans' "beliefs, their thoughts, their emotions and their sensations" that this case is concerned. For these are exactly what the Government wants when it demands access to records of a consultation with a psychiatrist.[7]

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[7] In response to the claim in the current Watergate trial that "national security" may have justified the burglary of Dr. Lewis Fielding's office, Assistant Special Prosecutor James F. Neal stressed that the target of the crime was "the most confidential of all communications between a patient who needs psychiatric help and a man who

(continued)

If Government employees (and other applicants for security clearance) can be forced, with as little justification as existed here, to turn over confidential psychiatric interview records – or to submit to interrogations by Government psychiatrists – then for all practical purposes they have no psychiatric privacy, they have no confidential psychiatrist-patient relationship, and there is a powerful instrument for Government to monitor their thoughts.

Psychiatric and psychological examinations, and the files generated thereby, are fundamentally different from other "medical" examinations. The former necessarily involve probing an individual's personality, rather than his physical attributes. Moreover, particularly in the case of "house" psychiatrists, institutional biases may exist that even the most dedicated scientist is unable to extirpate. Finally, the more thorough the examination (and therefore the more reliable), the more intrusive into the subject's personality it must be.[8]

2. It is not necessary to contend, however, and we do not contend, that no inquiry of a psychological nature may ever be made in connection with employment or security clearance. Instead, the issue is manageably narrow; it is that the invasion of petitioner's privacy which the Government demanded was far greater than necessary in the circumstances.

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[7] (continued) is giving it to him. If that is required to maintain this country, then we have lost sight of what this country is all about." The Washington Post, November 23, 1974, p. A6.

[8] See Note, Requiring A Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 Harv. L. Rev. 648 (1970).

In other types of cases, it is enough to inquire, as the Court of Appeals did here, whether the Government had "a reasonable basis" for demands it made. *E.g., Arnett v. Kennedy*, 416 U.S. 134 (1974); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1962).

But this case involves constitutional rights that warrant the type of finely tuned analysis the Court adopted in *Roe v. Wade*. Thus, in the First Amendment area, a Governmental restriction, if otherwise justified, must be:

> . . . no greater than is essential to the furtherance of that [legitimate Government] interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The same test has been held applicable to a more privacy-oriented challenge to censorship of penitentiary prisoners' mail. *Procunier v. Martinez*, 416 U.S. 396 (1974).[9] See also *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

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[9] *Procunier* also involved the related problem of the standards by which the private information would be judged, and by whom, 416 U.S. at 415, and there is similarly a concern here about whether access to the demanded information would be given to non-medical persons and about how such persons will interpret the information. *Cf.* Scott v. Macy, 402 F.2d 644, 648 (D.C. Cir. 1968).

Had this test been applied, there can be no doubt that petitioner's dismissal would not have been upheld.[10] In stating the facts the Court of Appeals pointed to petitioner's offer to have his doctors write reports to the Government's psychiatrist or, alternatively, to agree to an interview by the latter but accompanied by petitioner's own doctor and lawyer, 499 F.2d at 1099 (App. 4a); and then stated its belief that "the agency would have been well advised" to have followed one of these courses, *id.* at 1103 (App. 13a). But, said the court,

> . . . our disagreement with the agency does not mount to constitutional significance *(Ibid.)*.

We think it does. We think that if, as the Court of Appeals believed, the agency could have satisfied itself about petitioner's "emotional stability" without the invasion of his privacy which its demands involved, it was indeed constitutionally required to follow such a course. By rejecting this argument the lower court has committed error of profound significance to millions of Americans who do or may work for the Government or hold security clearances.

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[10] This is not to say that the Court of Appeals reached the correct conclusion even if its view of the law was correct. Instead, we think the invasion of privacy the Government demanded here was far more intrusive than was warranted by the facts known to the Government.

CONCLUSION

The Court should grant the petition and should reverse the decision of the Court of Appeals.

Respectfully submitted,

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December 2, 1974.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1141

ANONYMOUS, APPELLANT

v.

HENRY A. KISSINGER, SECRETARY, UNITED STATES DEPARTMENT OF STATE, ET AL.

Appeal from the United States District Court for the District of Columbia

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Decided July 5, 1974

John Vanderstar, with whom *Richard L. Dashefsky* and *Ralph J. Temple* were on the brief for appellant.

N. Richard Janis, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John A. Terry* and *Ellen Lee Park*, Assistant United States Attorneys were on the brief for appellees. *Earl J. Silbert*, United States Attorney, also entered an appearance for appellees.

Warren E. Magee filed a brief on behalf of the American Psychiatric Association as *amicus curiae.*

Before: FAHY, *Senior Circuit Judge,* LEVENTHAL and MACKINNON, *Circuit Judges.*

Opinion for the court filed by *Senior Circuit Judge* FAHY.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* MACKINNON.

FAHY, *Senior Circuit Judge*: This appeal is from a judgment of the District Court in a proceeding in which appellant unsuccessfully challenged the lawfulness of his dismissal as a temporary employee in a sensitive position in the Peace Corps, an agency in the Department of State.[1]

Appellant moved for summary judgment, accompanying his motion with an affidavit of his own and another of his counsel.[2] Appellees answered appellant's Amended and Supplemental Complaint (the complaint) and also

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[1] Appellant was permitted to proceed without identifying himself on the public record. The record filed on this appeal remains under seal.

[2] We do not consider that the action of the District Court prior to the filing of the Amended and Supplemental Complaint is before us in deciding the appeal, which is "from the order granting defendants' [appellees'] motions (1) to strike affidavits filed by the plaintiff in support of plaintiff's motion for summary judgment and (2) for summary judgment, and denying plaintiff's motion for summary judgment, entered in this section on the 30th day of October, 1972."

Appellant's motion was not only for summary judgment, but, alternatively, if the court should find that there was a genuine issue as to any material fact, for an *in camera* hearing or remand to the Board of the Foreign Service, or other appropriate agency, for an *in camera* hearing on such issue or issues.

moved for summary judgment and to strike the affidavits.[3] The motions of appellees were granted by the order on appeal.

I

The following facts appear to the court to have been undisputed when the motions for summary judgment were decided. Appellant's appointment in November, 1968, was designated as an "Emergency Appointment to Sensitive Position Pending Completion of Full Field Investigation."[4] His performance on the job was entirely satisfactory and his loyalty was not questioned. As part of a routine security investigation he had filled out Standard Form 86 when he had applied for employment. Question No. 19 on this form read:

> Have you ever had a nervous breakdown or have you ever had medical treatment for a mental condition?

He answered, "No." Although he had never had a serious mental illness or nervous breakdown, he told those conducting the investigation that he had on two occasions consulted psychiatrists briefly with minor complaints related to anxiety.[5] On February 5, 1969, the security investigators subjected him to a humiliating and degrading interrogation dealing principally with his sex life. During this interrogation the investigators seemed to imply that appellant was maladjusted sexually based on his admission to them that he had two isolated homosexual

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[3] Each party also filed a statement of their version of the undisputed facts, appellees' being designated as pursuant to Local Rule 9(h).

[4] The position held by appellant was classified as sensitive pursuant to section 3(a) of Executive Order 10450, 3 C.F.R. § 936 (1949-1953 Comp.).

[5] The first occasion was in the spring of 1967. His second consultation was at some time between September 23, 1968 when he executed Standard Form 86, and February 5, 1969, when he was interrogated by the security investigators.

experiences in early adolescence and that he and his wife had lived together from time to time before they were married.

About a month later the agency directed him to report to Dr. Francis Barnes, a private physician and the Peace Corps' Senior Consultant in Psychiatry. Upon advice of counsel he refused to do so. He also rescinded a release he had previously signed during the interrogation agreeing to make available to the agency confidential medical information. He offered through counsel to have the doctors he had consulted submit written reports about him for the Government psychiatrist to review. The agency rejected this offer, as well as a subsequent offer by appellant to meet with the Government psychiatrist, accompanied by his counsel and his own psychiatrist. The agency, however, insisted upon an examination by a psychiatrist selected or employed by the Government and upon access to all appellant's medical records in the possession of his psychiatrists. Appellant, deeming this an unwarranted invasion of his privacy, refused. During this period his attorney at the time stated in a letter of March 21, 1969, to the General Counsel of the agency, that an attorney in the office of the General Counsel said to appellant's attorney that the agency was considering dismissing appellant because of "alleged homosexuality—or, in the alternative, his private sexual relations with his fiancee."*

During this month of March, 1969, appellant was advised by the agency that he would be dismissed if he did not release his medical records and submit to questioning by a Government psychiatrist. Thereupon, on March 26, 1969, appellant filed his original Complaint in the

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*The General Counsel in reply to the letter of March 21 states that the attorney in his office referred to denies such a statement was made.

District Court seeking to enjoin such action and for related relief. No injunctive relief preventing, the agency notified appellant he was to be dismissed as of April 15, 1969, because of his "refusal to cooperate" in the Peace Corps' efforts to resolve its doubts regarding his suitability for continued employment. See letter from Ruth L. Olson, Director of Personnel, to appellant[1]

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[1] This letter, dated March 28, 1969, reads:

Personal

[Address]

Dear [appellant]:

I am writing to advise you that your Peace Corps Foreign Service Reserve appointment will be terminated as of close of business April 15, 1969, for reasons set forth below, which have been explained to you and to your counsel, Monroe Freedman, Esq. Although under pertinent law and regulation no reasons need be provided for the separation of a Foreign Service Reserve Officer appointee, we shall do so in this case in order to correct the allegations regarding our grounds for your separation found in your complaint recently filed in the United States District Court for the District of Columbia.

The emotional stability of employees who are to hold sensitive positions is of great interest to the Government as an employer. This is indicated by question 19 on the Standard Form 86 ("Security Investigation Data for Sensitive Position") which you signed and thereby certified as being correct on September 23, 1968. That question is "Have you ever had a nervous breakdown or have you ever had medical treatment for a mental condition?" It is our belief, based on information you have provided, that your negative response was, at the very least, less than candid with respect to a fact material to your suitability for employment.

The information you have provided regarding your past and present psychiatric treatment necessarily raises a question as to your suitability for the non-critical sensitive position in which you are employed. It is our obligation to resolve any doubts regarding the suitability for continued employment of Peace Corps personnel and

The ruling of the District Court as to the reasonableness of appellant's dismissal assumes that his refusal to cooperate as requested was the actual reason for his dismissal. In so deciding the District Court disregarded the stricken affidavits of appellant and his former counsel, deeming the court to be bound by the administrative record as presented by the agency.[8] Nevertheless, we think the record before the District Court on the motions for summary judgment justified the assumption we attribute to the District Court.

The complaint alleges that the letter from the Director of Personnel to appellant, note 7, *supra*, "falsely states that Plaintiff was discharged because of his 'refusal to

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> we are unable to do so in your case because of *your refusal to cooperate in this effort*. Specifically, you have refused to authorize the release of information concerning medical treatment you have received in the past, and to discuss this issue with our own medical personnel. The duties of your position are such that their performance by an emotionally unstable employee would threaten a serious adverse effect on the efficiency of the service. (Emphasis added.)
>
> Sincerely,
>
> Ruth Olson
> Director, Office of Personnel

[8] The cases cited to us in support of the position of appellees respecting this limitation upon the District Court differ from the present case. In those cases the administrative records incorporated hearings at which the factual issues had been developed. No hearing was either required or held at the administrative level in appellant's case. Appellant challenged in the District Court the official reason given in the administrative record for his dismissal, and contends that he cannot be precluded from a resolution of that challenge by an administrative record which omits the basis for the challenge and, on the contrary, supports only the agency-assigned reason. We do not pursue this problem further for the reason, now explained in the body of our opinion, that the record before the District Court covered the relevant substance of the stricken affidavits, that is, the alleged sexual motivation for the discharge.

cooperate'" in the security investigation and that appellees had no just and proper cause to discharge him, the reason given being a subterfuge. The complaint did not assert any other basis for the dismissal. Appellant's only allegations were to the effect that the facts demonstrated that he did cooperate to the extent that could be required consistently with his right of privacy. Moreover, in his affidavit accompanying his motion for summary judgment appellant alleges only that it was unfair and untrue to characterize him as uncooperative.[9]

When his complaint was prepared and filed the record which had been presented to the District Court by the agency [10] contained the letter of appellant's former counsel of March 21, 1969, to the General Counsel of the Peace Corps, asserting that "Mr. Grove," who was in the office of the General Counsel, "stated unequivocally that the reason for [appellant's] pending discharge was alleged homosexuality—or, in the alternative, his private sexual relations with his fiancee." The record also contained the General Counsel's response of March 25, 1969, stating, "First, Mr. Grove has assured me that at no time did he state to you 'unequivocally that the reason for [appellant's] pending discharge was alleged homosexuality—or in the alternative, his private sexual relations with his

[9] In the striken affidavit he added:

> I acknowledge that I have attempted to retain some degree of privacy for my deepest and most personal beliefs and attitudes, but I do not think any individual should be required to surrender his privacy to a nameless and faceless investigator. Despite my strong feelings on this subject, I offered through counsel to have the doctors I had seen write reports on me to the Government psychiatrist to be reviewed by him. . . . It seems strange, to say the least, that in view of this it is I who should be characterized as uncooperative.

[10] The record accompanied the Peace Corps' motion to dismiss the original complaint.

fiancee.' . . . Although Mr. Grove may have indicated that a question had been raised as to [appellant's] sexual behavior, he did not state that that behavior would form the basis for any administrative action concerning [appellant]." The letter also stated:

> I would like once again to make the point that I made when we met on March 20 and at the beginning of this letter. The Peace Corps has no wish to discharge [appellant]. On the contrary, we have every hope that, with his assistance, the question which has arisen concerning his suitability can be resolved satisfactorily and his employment can be continued. It was because of our desire to be fair to [appellant] and, if possible, to retain his services, that an explanation of our concern was offered rather than merely terminating his appointment without explanation.

With the foregoing correspondence a part of the record, the complaint nevertheless proceeded solely upon the theory that appellant's dismissal for "refus[ing] to cooperate" lacked support. The stricken affidavit of appellant's former counsel, though under oath of course, adds nothing to the relevant factual situation which was in the record before the court. It merely repeats what is reflected in the correspondence above outlined."[11]

Since the complaint itself places no reliance upon the sexual conduct of appellant as the basis for his dis-

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[11] The affidavit avers:

* * * *

> 3. . . . I telephoned David Grove, Esq., an attorney in the office of the General Counsel of the Peace Corps. He stated that the agency was considering dismissing [appellant] because of alleged sexual conduct, although Mr. Grove mentioned both homosexual and heterosexual conduct. In a letter to me dated March 25, 1969, signed by the General Counsel of the Peace Corps, it is stated that Mr. Grove did not say this. I am completely clear, however, that he did. . . .

missal, although the data with respect to that possibility was in the record filed by appellees, there was no necessity for the District Court to consider whether such conduct influenced the agency's decision to discharge appellant.[12] Appellant's refusal to cooperate was well supported as the basis upon which the agency stated its reason for the dismissal. In addition to the sequence of events which immediately preceded the dismissal, namely, the explicit warning, and the forewarned dismissal three weeks later, the concluding paragraph of the General Counsel's letter of March 25, 1969, expressed the hope that the question of "suitability can be resolved satisfactorily and his employment can be continued."

Moreover, the letter of Ms. Olson accompanying the dismissal action states its purpose to be "to correct the allegations regarding our grounds for your separation found in your [original] complaint recently filed . . . ," namely, that he would be dismissed unless he waived his

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[12] We so decide notwithstanding the District Court's statement in its Memorandum accompanying its Order, "The plaintiff in this case attempts to obscure the real issue in this case when he claims that his discharge was motivated by sexual conduct," for the court thereupon proceeds to state that the real question before the court is,

> whether a conditional appointee to a sensitive position with the United States Government who has falsely answered a question on a security questionaire may refuse to permit the Government access to relevant medical information and to submit to an interview (for non-treatment purposes) with a consulting physician and still retain his job.
>
> * * * *
>
> . . . Under the particular facts of this case, the court holds that the agency requests were reasonable and relevant to plaintiff's suitability for holding a sensitive position and that his discharge for refusal to cooperate was reasonable as well. . . .

constitutional rights by consenting to further interrogation and by waiving his physician-patient privilege. The Olson letter carefully sought to justify the need for further information by explaining:

> It is our obligation to resolve any doubts regarding the suitability for continued employment of Peace Corps personnel and we are unable to do so in your case because of your refusal to cooperate in this effort. . . .

The most that can be said for the sexual aspect of the matter, in the limited scope of appellant's challenge to his dismissal, is that it bore upon the agency's reason for desiring further cooperation with respect to appellant's psychiatric examination, rather than constituting a reason for his dismissal. As to the latter, we think no genuine issue of material fact barred summary judgment for appellees under the law applicable to the position, to which we now turn.

III

It appears that the only protection his position afforded him is to be found in the Constitution, since neither statute [13] nor regula-

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[13] Appellant's status is controlled by 22 U.S.C. § 1008 which provides:

> Notwithstanding the provisions of this or any other law, the Secretary may, under such regulations as he may prescribe, terminate at any time the services of any Reserve officer or staff officer or employee serving under limited appointment, except that, if the termination is because of misconduct, the provisions of section 1007 of this title shall be applicable.

At no time did appellant, before the agency or in the District Court, advance the right to a hearing or other proceedings on the theory he was being charged with misconduct within the meaning of 22 U.S.C. § 1007. No suggestion to that effect was made in appellant's main or reply briefs in this

tion [14] helps him. This contrasts with the situation recently considered by the Supreme Court in *Arnett* v. *Kennedy*, —— U.S. —— (April 16, 1974). In the course of the several opinions in that case it is pointed out that one in a temporary position—or pending completion of investigation—is protected only by due process of law from patently arbitrary or discriminatory dismissal. He has that much protection because of the property interest incident to his position, even though it is of a probationary or non-tenured character. Thus, Mr. Justice White stated that while Congress may limit the total discretion of the Executive in dismissing an employee by providing, for example, that it

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court. It was mentioned during oral argument. In this situation we do not reach or decide the case on the theory of misconduct, and thus 22 U.S.C. § 1007 does not apply.

22 U.S.C. § 1007 provides:

> (a) The Secretary may, under such regulations as he may prescribe, separate from the Service any Foreign Service officer, Reserve officer, or staff officer or employee, on account of the unsatisfactory performance of his duties, or for such other cause as will promote the efficiency of the Service, with reasons given in writing, but no such officer or employee shall be so separated until he shall have been granted a hearing by the Board of the Foreign Service and the unsatisfactory performance of his duties, or other cause for separation, shall have been established at such hearing, unless he shall have waived in writing his right to a hearing. The provisions of this section shall not apply to Foreign Service officers of class 8 or any other officer or employee of the Service who is in a probationary status or whose appointment is limited or temporary, except when separation is by reason of misconduct. . . .

[14] Section 763.1 of the Foreign Affairs Manual is as follows:

> Except when the separation is by reason of misconduct . . . a staff officer or employee serving under a temporary or limited appointment may be separated at any time by a notice in writing.

must be for cause, and thus entitle the employee to a hearing, where the Executive's discretion is not so limited a hearing is not required. *Arnett* v. *Kennedy*, *supra*, —— U.S. at ——. The Court so held in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961). Nevertheless, "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952); *accord*, *Arnett* v. *Kennedy*, *supra*, —— U.S. at —— (White, J., concurring in part, dissenting in part); *Slochower* v. *Board of Education*, 350 U.S. 551, 556 (1956).

The question is whether the reason assigned by the agency for appellant's dismissal—the "refusal to cooperate"—was patently arbitrary. We think not. Undisputed facts furnished a reasonable basis for the agency to explore further the emotional stability of appellant for the sensitive position involved. In so viewing the matter, however, we do not decide that appellant was not qualified for continued employment. Our holding is quite limited: it is simply that the agency was within its rights to inquire further with respect to his emotional stability as an element of his qualifications for the sensitive position. We do not say that appellant's answer to question 19 on Standard Form 86 was false, as the District Court put it (note 12, *supra*). Whether his visit to the psychiatrist for a temporary anxiety is "medical treatment for a mental condition" is arguable, and if anything the emanations of *Bronston* v. *United States*, 409 U.S. 352 (1973), suggest it might not have served as a basis for a false statement prosecution. But his admitted resort to psychiatric counseling, even though limited, furnished reasonable ground, without infringing his constitutional right to privacy, see *Gayer* v. *Schlesinger*, 490 F.2d 740, 750 (D.C.Cir. 1973), for the agency to seek the requested cooperation in order to

obtain additional relevant information. We agree with the ruling of the District Court "that his discharge for refusal to cooperate was reasonable. . . ." The method of inquiry proposed by the agency, moreover, was not so unreasonable as to result in a deprivation of appellant's property interest inconsistently with e Fifth Amendment. The agency would have been well advised in our opinion to have accepted one of the compromises proposed by appellant, without necessarily binding itself to its result, but our disagreement with the agency in this respect does not mount to constitutional significance.

We have been concerned about the proper judgment to be entered in this case. While the Government was entitled to summary judgment, there is at least one aspect in which the judgment entered by the District Court incorporates a premise of false answer which we do not think should be established as a court's determination, and to avoid all possible questions about conclusiveness and finality, we think it appropriate in the interest of justice, 28 U.S.C. § 2106, to vacate the judgment and remand so that the court may re-enter a judgment on a basis which does not rest in part on a finding that appellant's answer was false.[15]

It is so ordered.

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[15] At the same time, having in mind the considerate tone of the General Counsel's letter of March 25, 1969, the parties could be given an opportunity to explore whether there still remains a possibility of disposition of the subject matter of this suit without even the stigma of a determination of a refusal on plaintiff's part to cooperate, for we discern the possibility that the plaintiff's actions may have reflected the strong legal position of his counsel, as to the ambit of his constitutional right of privacy, a point that this court finds is not without difficulty; and that the Government's course may have reflected, in part, (a) an attitude toward plaintiff's counsel, a possibility suggested by the denial of the accuracy of the assertions in the correspondence of plaintiff's counsel concern-

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MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: I concur in much of the foregoing opinion but would not go so far as to suggest that the agency should have accepted one of the compromises proposed by appellant. To my mind he was poorly advised by his counsel to refuse the request of the agency for an examination by the Peace Corps' psychiatrist and for available medical data. When he refused the request for the information, which he had a right to do, he forfeited any right he had to retain his job. The request of the agency was clearly within its power and the circumstances required it to request such additional investigation and information. His answer to the question was sufficiently false to warrant further investigation. That it might not justify a conviction for perjury under *Bronston v. United States*, 409 U.S. 352 (1973), is beside the point. This is not a perjury case. It is not even a criminal case. It is merely an effort by an agency of the United States to carry out its duty and obligation to staff its positions with competent, reliable people. I would affirm the judgment of the trial court.

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ing statements by Government counsel (see fn. 11 and text thereto), or (b) an assumption that plaintiff's procedural proposals were unreasonable. Even if it should develop that the matter cannot now be resolved by agreement as to procedure, or by plaintiff's acquiescence in the procedure which may be adhered to by the Government, the plaintiff may be able to propose an acceptable method of clarifying the administrative record to avoid the inference that he was being contemptuous. We presume that at the very least the Government would agree to update his administrative record to reflect the course of this litigation, including our opinion, and it may be possible for the parties and the District Court to fashion some additional step in the interest of justice.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANONYMOUS,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 765-69**
WILLIAM P. ROGERS, *et al.*,	:	
Defendants.	:	

[Filed October 30, 1972]

MEMORANDUM AND ORDER

Pending before the court are the cross motions of the plaintiff and the defendants for summary judgment and also the defendants' motion to strike affidavits filed by the plaintiff in support of his motion for summary judgment.

I

The plaintiff in this case attempts to obscure the real issue in this case when he claims that his discharge was motivated by sexual conduct. Rather, the real question before the court is whether a conditional appointee to a sensitive position with the United States Government who has falsely answered a question on a security questionnaire may re-

fuse to permit the Government access to relevant medical information and to submit to an interview (for non-treatment purposes) with a consulting physician and still retain his job.

This court endorses the right of private citizens to protection from governmental intrusion into one's private affairs and confidential relationships; nevertheless, when a person applies for employment, he elects to surrender some degree of privacy to the extent reasonably necessary for the employer to evaluate his suitability for the position sought. And when the employer, having hired the employee conditionally, discovers that the employee has engaged in some deception relative to qualifications, the employer has a right to investigate to determine whether the employee should be retained.

In this particular case, the employer, the United States of America, had more than a right to investigate - it had a duty since the President had ordered that a full field investigation be conducted on persons occupying positions designated as sensitive.[1] Under the particular facts of this case, the court holds that the agency requests were reasonable and relevant to the plaintiff's suitability for holding a sensitive position and that his discharge for refusal to cooperate was reasonable as well. The court notes that the procedures required by 22 U.S.C. §1008 (1970) and by regulation of the Secretary of State in Section 760, Volume IV of the Foreign Affairs Manual were followed.

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[1] Exec. Order No. 10,450, ___C.F.R. § ___, 5 U.S.C. §7311 (1970).

II

The court, sitting in review of the decision of an administrative agency, is limited to review of the administrative record, 5 U.S.C. §706 (1970) and cannot consider the affidavits filed by the plaintiff.

Therefore, it is this 26th day of October, 1972,

ORDERED:

1. That the defendants' motions to strike and for summary judgment are granted,

2. That plaintiff's motion for summary judgment is denied.

/s/ ALLEN B. BRYANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-690

ANONYMOUS,

Petitioner,

v.

HENRY A. KISSINGER, Secretary, United States Department of State, et al.,

Respondents.

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION FOR MENTAL HEALTH AND AMERICAN ORTHOPSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Approximately 20,000 of the nation's 25,000 psychiatrists are members of the Association.

The American Psychological Association is a non-profit professional organization of 40,000 psychologists of whom almost sixty percent are directly involved in areas of psychology which involve confidential patient relationships. The Association has participated in conferences and other proceedings

designed to protect the confidentiality of the psychotherapist-patient relationship.

The National Association for Mental Health is a citizens organization of one million lay and professional members whose purpose is to encourage efforts to prevent and treat mental illness and to improve the quality of mental health services throughout the nation.

The American Orthopsychiatric Association is a professional organization with a membership of 4,000 psychiatrists, psychologists, psychiatric social workers and mental health professionals.

All four of these non-profit organizations have a professional commitment to the timely diagnosis, care, and treatment of people with mental and emotional problems, including citizens in the employ of the United States Government. The ethics of their professions require that they keep in the strictest confidence revelations made to them by patients seeking help and that they do nothing in the course of diagnosis or treatment to injure the best interests of the patient. They are convinced that an aura of strictest confidentiality must surround the therapist-patient relationship if troubled persons are to feel free to seek professional help and to cooperate fully in treatment. Although they recognize the government's need in some circumstances for assurances of their employees' emotional and mental stability, they believe that such a need can and must constitutionally be accommodated by direct communications with the therapist and not by a wholesale demand for all of the patient's records compiled in the course of diagnosis or therapy. *Amici* are also convinced that the threat of exposure of all their records will prevent present and prospective government employees from seeking and receiving necessary help with their mental or emotional problems, to the detriment of themselves and the nation.

CONSENT OF THE PARTIES

Amici are filing this Brief with the consent of both parties. Letters to that effect have been filed with the Clerk.

QUESTION PRESENTED

Whether the Peace Corps acted arbitrarily and capriciously, in violation of the Due Process Clause of the Fifth Amendment and the Constitutional Right to Privacy, when it fired a probationary employee who declined to give government investigators *unlimited* access to *all* medical records of his treatment by private psychiatrists.

STATEMENT OF THE CASE

In November, 1968, petitioner was given a temporary appointment to a "non-critical sensitive position" in the Peace Corps, pending a full field investigation.[1] From that date until his dismissal in April, 1969, petitioner's "performance on the job was entirely satisfactory and his loyalty was not questioned." *Anonymous* v. *Kissinger*, 499 F.2d 1097, 1098 (D.C. Cir. 1974). After informing government investigators that he had on two occasions briefly consulted psychiatrists with minor problems related to anxiety, he was, in February, 1969, "subjected to a humiliating and degrading interrogation dealing principally with his sex life." *Id.* Subsequently, petitioner refused to see the Peace Corps' Senior Consultant in Psychiatry and rescinded a previously executed release making confidential medical information available to the agency. Petitioner *offered to have his private doctors submit written reports for government review* and to see a government psychiatrist if accompanied by his own lawyer and doctor. As the Court of Appeals noted,

> The agency, however, insisted upon an examination by a psychiatrist selected or employed by the government *and* upon access to *all* appellant's [petitioner's] *medical records* in the possession of his psychiatrists . . . [A]ppellant was advised by the agency that he would be

[1]Petitioner was employed as a correspondent analyst. In a letter dated March 28, 1969, Ruth Olsen, director of the Peace Corps' Office of Personnel, described petitioner's job as a "non-critical sensitive position." *Anonymous* v. *Kissinger*, 499 F.2d 1097, n7 (1974). The job was classified as sensitive pursuant to Executive Order 10450, 3 C.F.R. § 936 (1949-1953 Comp.).

> dismissed *if he did not release his medical records* and submit to questioning by a Government psychiatrist.

Id. at 1099 (emphasis supplied).[2]

On March 28, 1969, petitioner filed suit seeking to enjoin his dismissal from the Peace Corps. Two weeks later, after his motion for a preliminary injunction was denied, he was fired by the agency pursuant to 22 U.S.C. § 1008.[3] In a Memorandum and Order dated October 26, 1972, the District Court held that the Peace Corps' request for access to all medical records and for petitioner's appearance before a government psychiatrist were "reasonable and relevant to the planitiff's suitability for holding a sensitive position and that his discharge for refusal to cooperate was reasonable as well." Petitioner's Brief at 26.

The Court of Appeals ruled that, as a temporary employee, petitioner had no statutory protection against peremptory agency dismissal.[4] *Anonymous, supra,* 499 F.2d at 1102. It stated that

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[2]The termination letter from Personnel Director Olsen to petitioner, see note 1, *supra,* stated:

> It is our obligation to resolve any doubts regarding the suitability for continued employment of Peace Corps personnel and we are unable to do so in your case because of your refusal to cooperate in this effort. Specifically, *you have refused to authorize the release of information concerning medical treatment you have received in the past,* and to discuss this issue with our own medical personnel. (Emphasis supplied.)

[3]That section provides, in pertinent part:

> . . . the Secretary may, under such regulations as he may prescribe, terminate at any time the services of any Reserve officer or staff officer or employee serving under limited appointment . . . .

The relevant regulation, which is found in Foreign Affairs Manual § 763.1, states:

> . . . a staff officer or employee serving under a temporary or limited appointment may be separated at any time by a notice in writing.

[4]*Anonymous, supra,* 499 F.2d at 1102. The relevant statutory provision and the supplementing regulation do not require that dismissal only be for "cause" nor do they mandate a hearing in the event of dismissal. They do provide for notice in writing, which petitioner was given.

petitioner had a "property interest" in his job cognizable under the Due Process Clause of the Fifth Amendment, but that the petitioner was not entitled to a hearing on his termination. The Court held that the Constitution did impose a substantive limitation on the agency's action:

> [o]ne in a temporary position—or pending completion of an investigation—is protected only by due process of law from patently arbitrary or discriminatory dismissal.

Id. at 1102. Although noting that the "agency would have been well advised . . . to have accepted one of the compromises proposed by appellant," the Court of Appeals concluded that "the method of inquiry proposed by the agency . . . was not so unreasonable as to result in a deprivation of appellant's property interest inconsistently with the Fifth Amendment." *Id.* at 1103. The Court also ruled that petitioner's "constitutional right to privacy" was not infringed.

ARGUMENT

The instant case presents a clearly defined question of "federal law which has not been, but should be settled" by this Court:[5] may the government intrude upon the psychotherapist-patient relationship by demanding unbridled access to *all* the psychiatric records of a probationary employee.[6] To put the

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[5]Supreme Court Rule 19.

[6]Petitioner was, in effect, fired for refusing to yield up all his psychiatric records. He was never given a choice of cooperating with government investigations *either* by allowing the government access to all his records *or* by seeing a government psychiatrist. *See* note 2, *supra.* Hence his dismissal turns on the records issue, since he was not fired just for refusing to see a government doctor. Because the Court of Appeals' disposition of the records issue will have such severe consequences on the relationship between patients and their psychotherapists, *amici* have concentrated on that issue.

However, the additional issue raised by petitioner, regarding compelled psychiatric interviews, presents important problems as well, in *amici's* view. And our emphasis on the records issue in this brief does not reflect on the merits of other matters raised by petitioner.

case in perspective, it is important to understand the issues which *amici curiae* believe are *not* before this Court. *Amici* do not question the validity or utility of government investigations in determining the suitability of prospective employees. They do not argue here that all information—as opposed to all actual medical records—concerning a probationary employee's psychiatric or psychological treatment should be withheld from government investigators, since relevant information may be easily obtained through direct reports by an employee's treating mental health professional. Nor do *amici* contend that petitioner was entitled to a termination hearing under the requirements of procedural due process.[7]

What *amici curiae* do respectfully submit is that under the substantive standards of review announced in previous decisions of this Court, this Court should grant *certiorari* and hold that government agencies violate the Constitution when they demand, upon pain of dismissal, unconditional access to all psychiatric or psychological records developed by a mental health professional during a probationary employee's course of treatment. This sharply focused question is of great import. *Amici* submit that if the Court of Appeals' rule is left standing and if government investigators have license to explore all of a temporary employee's medical and psychiatric records at will, then substantial unfairness to employees will result, potential civil servants throughout the nation will be reluctant to seek diagnosis and treatment from mental health professionals, and mental health professionals will be hindered in their efforts to provide necessary treatment to prospective or probationary employees.

Amici's contention that the Constitution has been violated by the Peace Corps' arbitrary dismissal of petitioner is premised on two arguments. First, *amici* contend that this Court should

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[7]Despite the Court of Appeal's ruling that petitioner had a limited property interest in his job "incident to his position, even though it is of a probationary or non-tenured character," *Anonymous, supra,* 499 F.2d at 1102, *amici* do not believe this Court need decide whether, as a matter of Constitutional law, petitioner should have been given a hearing before his dismissal. *Cf. Perry* v. *Sinderman,* 408 U.S. 593 (1972), *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) and *Arnett* v. *Kennedy,* 94 S. Ct. 1633 (1974).

grant *certiorari* because the agency violated the constitutional guarantee of Due Process by conditioning petitioner's employment on arbitrary and unfair governmental intrusion into the psychotherapist-patient relationship even though the relationship need not, for purposes of this argument, be given a constitutional dimension. Second, the action of the agency had the effect of arbitrarily conditioning petitioner's employment on the surrender of his constitutional right to privacy in his relationship with his psychotherapist.

I. This Court Should Grant Certiorari And Hold That The Peace Corps Violated The Constitutional Requirement Of Due Process When it Fired A Probationary Employee Who Refused To Allow Unlimited Governmental Intrusion Into The Psychotherapist-Patient Relationship.

(1) It is well-established that "there exist constitutional restraints upon state and federal governments in dealing with their employees . . . ." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 897-98 (1961); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952); *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). Even though a federal employee may not have a right to public employment under the Due Process Clause, *Wieman, supra* at 192, the federal government cannot remove an employee "if the *announced* grounds for . . . [the] exclusion . . . [have] been patently *arbitrary or discriminatory.*" *Cafeteria Workers, supra* at 898 (emphasis supplied). As the Court of Appeals observed in the instant case, this substantive limitation on governmental action applies whether the person fired is a probationary or permanent employee. *Anonymous supra*, 499 F. 2d at 1102. *See also Perry, supra* at 596-97.[8]

(2) This Court has often held that government agencies have "arbitrarily" and therefore unlawfully dismissed a public

[8]The constitutional standard of "arbitrariness" is, presumably, less broad than the "for cause" standard which limits Peace Corps dismissals of regular employees, 22 U.S.C. § 1007.

employee because they conditioned employment on surrender of constitutionally protected rights. *See, e.g., Perry* v. *Sinderman, supra,* 408 U.S. at 597; *Wieman* v. *Updegraff, supra,* 344 U.S. at 192; *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); U.S. at 192; *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968); *cf. Tygrett* v. *Washington* (D.C. Cir. No. 72-1876, October 23, 1974). Government, that is, may not penalize or inhibit the enjoyment of constitutionally protected freedoms through the employment relation, *Perry, supra* at 597, for this would allow government to do indirectly what it "could not command directly." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). Similarly, a holding that government has unreasonably dismissed a public employee may be based on grounds other than an agency demand that employees forego exercise of constitutional liberties:

> The concern of the Court that fundamental fairness be observed when the State deals with its employees has not been limited to action which is discriminatory and infringes on constitutionally protected rights. . . .

Arnett v. *Kennedy,* 94 S. Ct. 1633, 1658 (1974) (White, J., concurring in part and dissenting in part). *See also Slochower* v. *Board of Education,* 350 U.S. 551 (1956).[9]

In this section, *amici* maintain that the agency's intrusion into the important psychotherapist-patient relationship is arbitrary and unfair, even though the relationship itself need not be

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[9]As Justice White stated in his separate opinion in *Arnett* v. *Kennedy,* 94 S. Ct. 1633, 1659 (1974):

> In *Slochower* . . . New York law provided that a tenured employee taking the Fifth Amendment before a legislative committee inquiring into his official conduct could be fired. Quite apart from the Fifth Amendment "penalty" assessed by the State, the Court was concerned with the arbitrariness of drawing a conclusion, without a hearing, that any employee who took the Fifth Amendment was guilty or unfit for employment.

• *See generally,* Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees,* 19 U.C.L.A. L. Rev. 1052 (1972); Note, *Dismissal of Federal Employees—The Emerging Judicial Role,* 66 Col. L. Rev. 719 (1966).

accorded constitutional protection. (For the argument that the agency arbitrarily conditioned employment on surrender of a constitutional privacy right, see Section II, *infra.*)

(3) The maintenance of a confidential psychotherapist-patient relationship is necessary for two basic reasons. First, the promise of confidentiality is imperative if a psychotherapist[10] is to establish a successful treatment relationship with a patient, since patients must feel free to reveal their most personal thoughts, experiences, fantasies and memories.[11] Second, if patients cannot be assured of a confidential relationship with their psychotherapist, they will refrain from seeking the expert assistance of a mental health professional when they need it.[12] These rationales and the paramount importance of a confidential psychotherapist-patient relationship are manifested in medical

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[10]There is little, if any, difference in patients' minds between disclosures made to neutral health professionals with a medical degree (psychiatrists and psychoanalysts) and those with doctorates (psychologists). *See* J. Robitscher, Pursuit of Agreement: Psychiatry and the Law 215 (1966). *See also* Proposed Rules of Evidence for United States Courts and Magistrates, Rule 504(a)(2) (licensed psychologists included in psychotherapist-patient privilege).

[11]Robitscher, *supra,* note 10, at 230-232; S. Freud, The Interpretation of Dreams 100-101 (Std. Ed. Vol. 4, Hogarth, London (1958)). ("We . . . tell him that the success of the psychoanalysis depends on his noticing and reporting whatever comes into his head. . . .") *See also* R. Waelder, Basic Theory of Psychoanalysis 238 (1960).

[12]Goldstein and Katz, *The Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute,* 36 Conn. Bar J. 174, 178-179 (1962)

> . . . the overwhelming view of psychiatrists is that patients need and expect assurance that their disclosures will remain confidential. The patient, however much in need of treatment, is ordinarily reluctant to seek it. . . . Even under optimum conditions of confidentiality, it is difficult for the patient to confide his thoughts and feelings to another person. If to that difficulty is added the possibility of disclosure at some future date, it can be expected that he will not speak freely and that his concern about the other implications of treatment will be reinforced.

ethics[13] and in statutory privilege.[14] Moreover, the significance of the relationship is reflected in the Proposed Rules of Evidence for United States Courts and Magistrates approved by this Court in 1972. The proposed rules recognize a special psychotherapist-patient privilege, while refusing to adopt a general privilege for physician and patient. Rule 504. As a succinct statement of the basis for the privilege, the Advisory Committee Note quotes from Report No. 45, Group for the Advancement of Psychiatry 2 (1960):

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' con-

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[13] *See, e.g.*, Judicial Council of the American Medical Association, *Principles of Medical Ehtics*, J. A.M.A. Sp. Ed. June 7, 1958 Section 9; American Medical Association House of Delegates Resolution 39 (June 1974) (importance of AMA "efforts to develop methods to minimize the demands for medical record information, the increasing dissemination of the same, and for protection of our patients from harm by such information inadvertently or intentionally being misused, or by the misapplication of this personal data for other than the original medical purposes; . . . .").

[14] *See, e.g.*, Cal. Evidence Code §§ 1010-1026; Ga. Code § 38-418 (1961 Supp.); Conn. Gen. Stat. § 52-146a (1966 Supp.); Ill. Rev. Stat. 1967, c. 51 § 4.2; Advisory Committee Note to Rule 504, *supra* note 10; Goldstein & Katz, *supra* note 12, at 180-181; Louisell, *Confidentiality, Conformity and Confusion*, 31 Cal. L. Rev. 101, 108 n.39 (1956). *See also Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) ("In regard to mental patients, the *policy behind such a statute is particularly clear and strong.* Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." (emphasis supplied.)).

scious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

(4) In this case, the agency's demand for unqualified intrusion into the important psychotherapist-patient relationship was arbitrary. Unrestricted access to *all* of the petitioner's clinical records was unnecessary and would elicit irrelevant, misleading and possibly prejudicial material of a highly personal nature. The fundamental unfairness of conditioning employment on the yielding up of such material is best understood by examining three related factors: the nature of the records; the scope of material contained in the records; and the nature of the waiver demanded of petitioner.

(a) *Nature of the Records.* By requesting access to all of petitioner's clinical records, the agency was, in effect, seeking to obtain raw data from petitioner's doctors which, besides being either irrelevant or prejudicial, would not, in all likelihood, reflect the doctors' rounded view of the petitioner's mental condition at the time of treatment. There is no universally accepted method for recording psychiatric or psychological therapies. Accordingly, information contained in a written record may take the form of sketchy and incomplete notes rather than a fully developed case history.[15] Moreover, the content of such "records" will vary widely with the particular mental health professional: "speculative material" and "creative jottings" re-

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[15]*See* Gabrielli, "Background Paper on Topic Five for American Psychiatric Association Conference on Confidentiality of Health Records," November 7-9, 1974 (hereinafter Confidentiality Conference); Jackson, "Consideration of the 'Active Working Record' versus the 'Permanent Record'" (Working Paper for Confidentiality Conference); *Gotkin* v. *Miller*, (unreported) (E.D.N.Y. 1974) (*appeal pending*, 2d Cir. No.74-2138) (Joint Appendix on Appeal, A-45-46, Affidavit of Marvin Lipschitz, Medical Director of Gracie Square Hospital) ("It must be remembered, of course, that many of these records contain the of-the-moment ruminations of physicians, as well as the impulsive and other utterances of the patients. . . .").

flecting the therapists" immediate perceptions or diagnoses may be included but subsequent modifications or alternative conclusions may not.[16] And written records may be sketchy precisely because therapists fear that exposure will harm their patients.[17] Thus, clinical records may, by their very nature, give a distorted or fragmented portrait of the patient to third parties, and mental health professionals are extremely reluctant to disclose such records to anyone other than a professional treating the same patient.

The unfairness of requesting access to such misleading raw data is especially acute in the case of a probationary employee. Since such an employee is accorded no right to a hearing by statute, government personnel—even trained professionals—may draw unwarranted conclusions from the data without providing the probationary employee or his therapist an opportunity to place the material in context or to correct errors.

(b) *Scope of records.* A therapist's written record of his contact with a patient may be as broad as the patient's whole psychological history and will thus contain material which, al-

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[16]Strassburger, "Problems Surrounding 'Informed Voluntary Consent' and Patient Access to Records," (Paper for "Confidentiality Conference", note 15, supra.) (". . . with the passage of time . . . the original speculative nature of the material tends to be minimized or forgotten and a 'creative jotting' can haunt a poor patient for the rest of his life."). Moreover, such records may be easily misinterpreted since they are usually written in "the specialized language of psychiatry", GAP Report No. 45, *supra* at 92-93. *Compare* American Psychiatric Association Standards For Psychiatric Facilities (1969), Standard 34 (urging very complete records) with GAP Report No. 45, at 92 (cautioning that complete records may lead to harm to patients).

[17]*See* R. Slovenko, Psychotherapy, Confidentiality, and Privileged Communication 116 (1966):

> [T]he best protection that can be ensured to the patent is the exercise of extreme caution in writing records. . . . Incomplete clinical records, of course, are not scientifically desirable, but the therapist is in the unfortunate position of having to choose between keeping incomplete records or no records at all, or, on the other hand, of subjecting his patient to the possibility of having his most intimate confidences revealed. . . .

See also Lewis, *Confidentiality in the Community Health Center*, 37 Am. J. Orthopsychiatry 946, 951 (1967).

though highly personal, is of no relevance to the probationary employee's job capability.[18] Not all personal information is relevant to job fitness, for as the former Senior Psychiatric Consultant to the Peace Corps and the Chief Psychiatrist of its medical division have written:

> The Peace Corps Psychiatric Branch, on seeking information about an applicant's emotional stability, has no intention of interfering with effective psychotherapy or in hearing confidential information which is unrelated to the issue at hand.[19]

Even the Civil Service Regulations which authorize investigations into a probationary employee's mental history do not speak in such broad terms as to require or even authorize a demand for access to all medical records.[20] Thus, it is fundamentally unfair and arbitrary to require total disclosure of records which may cover the whole scope of the temporary employee's personality and psychological development, for, again,

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[18]In fact, many psychiatrists feel that even their professionally screened impressions of the patient do not permit evaluation of his potential ability to perform in a job situation outside of the therapy relationship. *See* Menninger and English, *Confidentiality and the Request for Psychiatric Information for Nontherapeutic Purposes,* 122 Am. J. Psychiatry 638, 640-44 (1965). They may feel their impression of the patient in therapy may be totally irrelevant or actually misleading as an indicator of his ability to function in the outside world. Errera, *Common Sense Approaches to Confidentiality,* 19 Hospital and Community Psychiatry 347 (1968).

[19]Menninger and English, *supra* note 18, at 640.

[20]Ex. Order 10450, 3 C.F.R. Cod. Pres. Doc. Ch. IV § 8 (1973) authorizes investigation into "any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee with due regard to the transient or continuing effect of the illness and the medical findings in such cases." *Cf.* 5 C.F.R. 294.401(b) (1973) (providing that access to medical information about an employee in the government's possession on request of the employee "concerning a mental condition of such a nature that a prudent physician would hesitate to inform a person suffering from it of its exact nature and probable outcome may be disclosed only to a licensed physician designated in writing for that purpose by the individual or his designated representative.").

there is no way to counter irrelevant, misleading or prejudicial matters.[21]

(c) *Nature of the Waiver.* Under the ruling of the Court of Appeals, a probationary employee must waive his interest in a confidential psychotherapist-patient relationship and allow access to all his clinical records or suffer dismissal. But in most instances, a temporary employee has not seen his own psychiatric records. There is basic unfairness when a probationary employee is required to waive confidentiality and allow government investigators access to raw records, the contents of which he does not know—and this is especially so given the potential problems regarding the nature and scope of those records outlined above.[22] Moreover, many hospitals and mental health professionals will not accede to requests by patients to view the patients' records.[23] Thus, many probationary employees in petitioner's position may not have a legally recognized right to see their records, even if they want to.[24] Surely it would be arbitrary and unfair to dis-

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[21]Moreover, there is no way to control what happens to such records, once they are handed over to the government, or who will see them. *See, e.g.,* Menninger and English, *supra* note 18, at 642. ("The Peace Corps acknowledges that many areas of our society and indeed other government agencies may consider psychiatric contact a stigma, and further may not maintain such information in a confidential file separate from the personnel file. It is only human for an applicant to have reservations about giving permission for the agency to have access to the information when it is so open to misinterpretation. . . .")

[22]*See* Robitscher, *supra* note 10, at 206; GAP Report No. 45, *supra* note 16, at 99; Slovenko, Psychotherapy, *supra* note 17, at 154 ("When the patient waives the psychotherapy privilege he does not know what he is waiving.") *See also* R. Slovenko, Psychiatry and the Law 440 (1973).

[23]They will only disclose such records to another therapist designated by the patient. *See, e.g., Gotkin* v. *Miller, supra* note 15, (reported in Joint Appendix on Appeal A-90, note 8) ("Statistically, the overwhelming majority of states do not permit a former mental patient access to his medical records either directly or indirectly, prior to the maintenance of a suit for malpractice," citing DHEW, Appendix to Report of Secretary's Commission on Medical Malpractices (Cal. 1973) at 181.).

[24]*Gotkin* v. *Miller, supra* note 15; *Van Allen* v. *McCleary,* 211 N.Y.S. 2d 501 (Sup. Ct. Nassau Cnty. 1961); *Wallace* v. *Univ. Hosp. Cleveland,* 164 N.E. 2d 916 (Ct. Comm. Pleas. Ohio 1959).

miss a temporary employee for refusing to waive his confidential interest in his clinical records when he has no legally recognized right of access to those records in the first place.

(5) To hold that the agency's request for access to all petitioner's psychiatric records is fundamentally unfair and arbitrary is not, of course, to rule that the government may not specifically inquire into a course of psychiatric treatment received by probationary employees when the agency seeks to determine suitability for permanent employment. Mental health professionals are cognizant of the federal government's need to ascertain the emotional stability of applicants, especially those who would be employed in sensitive positions. But that need can be fully and effectively met by a direct report, presented either orally or in writing, from the treating mental health professionals who, with the consent of their patients, can respond to specific questions and synthesize, where appropriate, their understanding of their patients' condition.

When the government trenches upon the sensitive area delimited by the psychotherapist-patient relationship, judicial review of agency action should follow the method of analysis suggested, albeit in a procedural context, by this Court in *Cafeteria & Restaurant Workers Union* v. *McElroy, supra* at 895: ". . . what . . . due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." In the instant case, when governmental needs could be met more effectively and expeditiously in another manner and when the method of investigation chosen unfairly intrudes into the vitally important and widely accepted patient interest in a confidential relationship, then the agency acts arbitrarily, in violation of Due Process guarantees, if it dismisses a probationary employee, who has no statutory right to a termination hearing, for failing to give government investigators unqualified access to all his clinical records. This Court should grant *certiorari* to so hold.

II. This Court Should Grant Certiorari To Define The Nature Of Petitioner's Constitutional Privacy Right In His Confidential Relationship With His Psychotherapist.

An alternative ground for reversing the Court of Appeals' decision is that the Peace Corps' request for all petitioner's psychotherapeutic records unnecessarily infringes his constitutional right to privacy in his confidential relationship with his psychotherapist. By conditioning petitioner's employment on an invasion of his right to privacy, the agency acted arbitrarily and capriciously in violation of the Constitution.

The threshold issue in this argument—whether petitioner's constitutional privacy right extends to the treatment relationship with his psychotherapist—may be addressed by this Court in *Roe* v. *Doe*, No. 73-1446, *cert. granted*, 43 U.S.L.W. 3038 (Aug. 13, 1974).

(1) It is well established, of course, that "a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution." *Roe* v. *Wade*, 410 U.S. 113, 152 (1973). In determining whether a particular interest is within the constitutionally protected zone of privacy, this Court has looked to several factors. First, matters affecting the *fundamental autonomy of the individual* have received protection. *Roe* v. *Wade*, *supra* at 153; *Eisenstadt* v. *Baird*, 405 U.S. 438, 452 (1972). Second, matters affecting *intimate relationships* such as family, marriage, motherhood and child-rearing have been deemed within the ambit of constitutional privacy. *Roe* v. *Wade*, *supra* at 152-53; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 66 n.13 (1973). Third, the *place* where fundamental autonomy has been exercised or the intimate relationship fulfilled—such as the home—has been considered. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Paris*, *supra*. Finally, a person's interest in *selective disclosure of highly personal matters* regarding intimate relationships has

been held to be within the constitutional zone of privacy, *Griswold, supra* at 485.[25]

(2) In the instant case, those factors to which this Court has looked in establishing constitutional privacy rights are manifestly present. The unqualified intrusion by governmental investigators into petitioner's psychiatric records inhibits the fundamental autonomy of prospective government employees by discouraging individuals from seeking the help of mental health professionals or by impairing a treatment relationship which might make individuals well. Such intrusion also affects the intimate relationship between a patient and his psychotherapist—a relationship in which the patient brings forth highly personal matters that may not even be revealed to intimate family members. See pp. 9-15, *supra*. The decisions in *Roe* v. *Wade, supra*, 410 U.S. at 153, and *Doe* v. *Bolton*, 410 U.S. 179 (1973), have stressed the fundamental importance of the relationship between patients and their doctors regarding intimate and private matters. *See also United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 127 n.4 (1973) ("sphere of constitutionally protected privacy, such as that which encompasses the intimate medical problems of family, marriage and motherhood"). Further, in *Paris, supra at* 66 n.13, this Court observed that the "constitutionally protected privacy" surrounding intimate relationships "extends to the *doctor's office*, [and] *the hospital*" (emphasis supplied). And it is obvious that patients have a profound interest in the selective disclosure of the highly personal information that is developed during the course of a therapeutic relationship with a mental health professional. Accordingly, petitioner, in the circumstances of this case, had a constitutional right in a private relationship with his treating psychiatrists. And

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[25]*Griswold* may be read as expressing this Court's concern about governmental investigation and disclosure of highly personal material relating to marriage ("Would we allow the police to search the sacred precincts of the marital bedroom for telltale signs of the use of contraceptives.") *See* Note, *Roe and Paris: Does Privacy Have a Principle*, 26 Stan. L. Rev. 1161, 1163-65 (1974); Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920, 929 (1973). The philosophical writing on privacy has given special weight to the selective disclosure dimension of the privacy concept. *See* Note, *Roe and Paris: Does Privacy Have a Principle*, *supra*.

such privacy rights are "fundamental," and may be abrogated only for a "compelling state interest." *Roe* v. *Wade, supra,* 410 U. S. at 153-5.

(3) Establishment of petitioner's fundamental right to privacy in his relationship with his psychotherapist does not mean that the federal government's legitimate interest in determining the suitability of a probationary employee must be given no weight. *Cf. Pickering* v. *Board of Education,* 391 U.S. 563 (1968). "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate." *Roe* v. *Wade, supra,* 410 U.S. at 154. The guiding principle, which accommodates petitioner's privacy right and the government's interest in hiring suitable employees, has been succinctly expressed in an oft-quoted passage from another public employment case:

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of . . . [governmental] abridgement must be viewed in light of less drastic means for achieving the same basic purpose.

Shelton v. *Tucker,* 364 U.S. 479, 488 (1960). *See also Roe* v. *Wade, supra* at 155. Thus, the Peace Corps acted arbitrarily, in violation of the Constitution, since it conditioned petitioner's employment on an unqualified infringement of petitioner's constitutional right to privacy, *Perry* v. *Sinderman, supra,* 408 U. S. at 597. Requesting unbridled access to all psychiatric records was both unfair and unnecessary because an alternative method of investigation existed—direct consultation with petitioner's doctors—which would have been less intrusive, as well as more effective, expeditious, and just. See Part I, *supra.*

CONCLUSION

The decision by the Court of Appeals will have a significant impact on the employment practices of the federal government

since a great proportion of federal employment litigation must be brought in the District of Columbia Circuit. For this reason, and for the other reasons set forth above, *amici curiae* respectfully request that this Court grant *certiorari* to decide whether a probationary employee may be fired for declining to give government investigators *unlimited* access to *all* records of his treatment by private psychotherapists.

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Dated: December 17, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-690

ANONYMOUS, PETITIONER

v.

HENRY A. KISSINGER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-14a) is reported at 499 F.2d 1097. The unreported opinion of the district court is reproduced as petitioner's Appendix B, pp. 1b-3b.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1974. On September 23, 1974, Mr. Justice Brennan issued an order extending the time for filing a petition for a writ of certiorari to and including December 2, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States, having reason to suspect a prospective employee's emotional fitness for a sensitive government position, may require him to aid an investigation by consenting to a psychiatric interview and by submitting to government psychiatrists relevant psychiatric records, and whether such employee may be dismissed from his temporary position for refusing to do so.

STATEMENT

Petitioner challenges his dismissal from a temporary position in the Peace Corps, formerly an agency of the Department of State.[1] Petitioner's position was designated an "Emergency Appointment to Sensitive Position Pending Completion of Full Field Investigation" (Pet. App. 3a). A full field investigation was required since the position was classified as "sensitive" pursuant to Executive Order 10450, Section 3(b), 3 C.F.R., p. 58. . A full field investigation necessarily includes an examination of information relating to "[a]ny illness, including any mental condition, of a nature which * * * may cause significant defect in the judgment or reliability of the employee" (Executive Order No. 10450, Sec. 8(a)(1)(iv), 3 C.F.R., p. 60).

Prior to his conditional appointment, petitioner executed Civil Service Standard Form 86 ("Security Investigation Data For Sensitive Position"). In response to question 19, "Have you ever had a nervous breakdown or have you ever had medical treatment for a mental condition?", petitioner responded "No" (Pet. App. 3a). In the course of the investigation, however, the agency learned that he had consulted a psychiatrist both before

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[1]After the instant action was instituted, the Peace Corps was transferred from the State Department to Action, an independent agency. Executive Order No. 11603, 3 C.F.R., p. 303.

and after executing Form 86 (Pet. App. 3a-4a). Pursuant to the government's responsibility to investigate the mental and emotional stability of prospective employees in sensitive positions, petitioner was requested to grant the government access to his medical records held by the psychiatrists he had seen. Petitioner complied with this request (Pet. App. 4a).

Subsequently, petitioner was requested to report for an interview with a consulting psychiatrist for the Peace Corps. Petitioner refused this request, and also rescinded his previous release of medical records. He offered, however, to have his own doctors submit written reports about him for the government psychiatrists to review (*ibid.*). Deeming petitioner's suggestion inadequate, the Peace Corps advised petitioner that unless he agreed to the requests for a psychiatric examination and for access to his psychiatric records, the agency would be forced to dismiss him because it would be unable to establish his suitability for employment (*ibid.*).

Petitioner elected not to cooperate and instead instituted this action, alleging that the government's requests constituted an unwarranted invasion of his privacy and seeking to enjoin the agency from dismissing him. The agency thereafter notified petitioner that he was dismissed for failing to cooperate with the agency's security investigation (Pet. App. 5a). The district court subsequently granted respondent's motion for summary judgment based on its finding that the agency had a right and duty to investigate, and that the requests made of petitioner were reasonably related to the investigation (Pet. App. 2b). The court of appeals affirmed, holding that "the agency was within its rights to inquire further with respect to [petitioner's] emotional stability as an element of his qualifications for the sensitive position" (Pet. App. 12a).

ARGUMENT

Petitioner held his position conditionally, pending a full field investigation to determine his fitness for the job.[2] As the court of appeals stated, he was dismissed from that position because he failed to cooperate in the investigation of his mental condition (Pet. App. 9a-10a). There is no doubt that the government, acting as employer, must perform its obvious duty to insure that a prospective employee is qualified to perform the job he has applied for. If the position is a "sensitive" one, such as petitioner's job with the Peace Corps, the investigation must determine whether the prospective employee has "any mental condition * * * which * * may cause significant defect in the judgment or reliability of the employee * * * ." Executive Order 10450, Section 8(a)(1)(iv), 3 C.F.R., p. 60. Petitioner does not dispute that the government's investigation of an applicant's fitness can include inquiries of a psychological nature (Pet. 9); instead, he seeks to limit the information he may be required to disclose to aid the investigation. But just as an applicant may be required to submit to a physical examination or allow inspection of medical records to determine his suitability for employment (cf. *Yates* v. *Manale*, 377 F.2d 888 (C.A. 5)), so can petitioner be required to present the information requested here. The data is needed to evaluate fairly the applicant's qualification for the job, and he cannot simultaneously apply for the position and withhold information that will determine whether he should be given the position he seeks.

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[2]The case thus differs from *Arnett* v. *Kennedy*, 416 U.S. 134, which involved the question whether a nonprobationary federal employee had a right to a trial-type hearing before being discharged (an issue that is not presented in this case).

Petitioner invokes a generalized constitutional right of privacy to support his contention that in conducting its investigation the government was required to use the least restrictive means possible (Pet. 10). Whatever the merits of that contention when the person investigated has not applied for the position, when, as here, a person affirmatively seeks government employment, he cannot do so on his own informational terms. Cf. *Pickering* v. *Board of Education,* 391 U.S. 563, 568. Petitioner exercised his privilege of refusing to cooperate, but once having done so, he had no right to require the government to employ him (Pet. App. 14a). In order to be considered, applicants have a duty to respond truthfully and fully to questions properly relating to their qualifications for a government license or position.[3] *Konigsberg* v. *State Bar,* 366 U.S. 36, 44-46; *Orloff* v. *Willoughby,* 345 U.S. 83, 90-92; *Law Students Research Council* v. *Wadmond,* 401 U.S. 154; *Blumenthal* v. *Federal Communications Commission,* 318 F. 2d 276, 279 (C.A. D.C.). The government's inquiry here was properly related. The court below so found and held therefore that petitioner's dismissal for failure to cooperate was not arbitrary or capricious (Pet. App. 13a, 14a).

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[3]It is at best doubtful whether petitioner fulfilled this duty. On his Standard Form 86 accompanying his application for employment, petitioner had answered "No" to the question whether he had "ever had medical treatment for a mental condition," although he later admitted that he had consulted "psychiatrists briefly with minor complaints related to anxiety" (Pet. App. 3a). The majority below did not decide whether petitioner's answer was false, as the district court found, although Judge MacKinnon, concurring in part and dissenting in part, believed that "[h]is answer to the question was sufficiently false to warrant further investigation" (Pet. App. 12a, 14a).

Moreover, the factual premise of petitioner's argument is not supported by the record. The interview and records requested in this case were the least restrictive means consistent with adequate inquiry into petitioner's suitability for the job. A current interview by a government psychiatrist would be perhaps the best method to determine if petitioner was mentally disqualified for the job. The request that he submit past psychiatric records was also necessary and appropriate to a proper investigation. Such records could be valuable to the government's psychiatrist in making his evaluation. Furthermore, once petitioner refused to undergo a current interview, the nature of his past experiences with psychiatrists took on greater significance. And the government was surely justified in demanding that its own psychiatrists review petitioner's records rather than relying on a summary prepared by petitioner's psychiatrist without knowledge of the full contours of the investigation or the other material developed.[4]

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[4]The majority in the court of appeals did not disagree, but stated only that (Pet. App. 13a):

> The agency would have been well advised in our opinion to have accepted one of the compromises proposed by appellant, without necessarily binding itself to its result, but our disagreement with the agency in this respect does not mount to constitutional significance.

The court noted that "plaintiff's [refusal to cooperate] may have reflected the strong legal position of his counsel," and that he thus should be given an opportunity to remove that "stigma" (Pet. App. 13a, n. 15).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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HENRY A. KISSINGER,
Secretary of State, *et al.*,

On Petition for a Writ of Certiorari to
The United States Court of Appeals for
The District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government, in its brief in opposition, attempts to show the correctness of the decision below but instead does the opposite. Moreover, the Government nowhere challenges petitioner's showing that the questions involved are extremely important and far-reaching.

The Government's argument on the merits is that whenever the subject matter of an inquiry is relevant to the qualifications of an applicant for employment (or a government license), the applicant must "truthfully and fully" answer every question put to him. (Op. Cert. at 5.) The

cases cited, if at all pertinent here, support the opposite position. In the *Koningsberg*[1] and *Law Students*[2] cases, the Court held that although the subject matter of the inquiry – knowing membership in organizations supporting the violent overthrow of the government – was relevant to the application for bar admission, general questions about membership in such organizations as the Communist Party were impermissible because they were unduly intrusive into protected areas of associational privacy.

That is the very point petitioner has made: Even in areas into which the Government may legitimately inquire, it may not range at will; it must precisely tailor its inquiries to avoid unnecessary intrusion into personal privacy. *Cf. Shelton v. Tucker*, 364 U.S. 479 (1960).

Petitioner accordingly urges that the Court grant the petition for certiorari and, on the merits, apply the principle of the Bar Admission cases to applications for Government employment.

The Court should also reject the Government's suggestion (Op. Cert. at 5 n. 3) an applicant gives a "false" answer if, having briefly consulted a psychiatrist with

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[1] Koningsberg v. State Bar, 366 U.S. 36 (1961).

[2] Law Students Research Council v. Wadmond, 401 U.S. 154 (1971), cited by the Government, decided with Baird v. State Bar, 401 U.S. 1 (1971), and In re Stollar, 401 U.S. 23 (1971).

minor complaints relating to anxiety, he has answered "No" to the question whether he had "ever had medical treatment for a mental condition."

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